

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 88 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

VAGHARI NAGALBHAI ALIAS	GUNGABHAI SHAMBHUBHAI
Versus	
STATE OF GUJARAT	

Appearance:

MR PK JANI for Petitioner No. 1
MR ND GOHIL, APP for Respondent-State.

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 10/01/2002

ORAL JUDGEMENT

1. The appellant-original accused by filing this

appeal under Section 374 of the Code of Criminal Procedure, 1973 (to be referred to as "the Code") has challenged the judgment and order dated January 15, 1999, passed by the learned Addl. Sessions Judge, Mehsana, in Sessions Case No.23 of 1998, whereby the appellant was convicted for the offence punishable under Sections 452 and 376 of the Indian Penal Code (IPC for short) and sentenced to undergo RI for 7 years and fine of Rs.5,000/-, in default RI for 6 months for the offence under Section 376 of the IPC. No separate sentence was imposed for offence under Section 452 of the IPC.

2. The prosecutrix Champaben Becharbhai was residing at village Zalori along with her parents, five sisters and two brothers. The prosecutrix was an eldest child of Becharbhai Keshabhai. On June 22, 1997, the prosecutrix was at her residence, at that time, Gungabhai Shambhubhai (appellant), Vithhalbhai Galabhai came to her residence and inquired about her father. They informed the prosecutrix that one Madhabhai, who was paternal uncle of the prosecutrix, was admitted at Gandhinagar Hospital. They told the prosecutrix to bring her father from the agricultural field. The prosecutrix therefore, went to the field and brought her father and mother to her residence. Accordingly her father and mother went to Gandhinagar on a scooter where paternal uncle Madhabhai was admitted. Thereafter, the appellant had left the residence of the prosecutrix on a cycle. As per the say of the prosecutrix, the appellant had returned to her house at 1-00 p.m. and stayed for couple of minutes and thereafter, had left the place. The prosecutrix, her sisters and brothers had locked the house from inside and had gone to sleep around 8-00 p.m. The prosecutrix has not put of electric light when she had gone to sleep. After some time, when the prosecutrix was in sleep, somebody gagged her mouth and,therefore, she had awakened and saw that the appellant had climbed over her body and had committed rape on her. The appellant had gagged her mouth and, therefore, she could not raise shout. The prosecutrix had tried to get rid of the appellant, but she was overpowered by the appellant. As per the say of the prosecutrix, her sisters Laxmi, Raji and Shobhna had also awakened due to raising of shouts. Her uncle Abibhai and Ishwarbhai Sampatbhai and other people had come to her rescue. The persons who had come to the rescue of the prosecutrix had caught hold of the appellant and had locked him in the room. In the morning, the Sarpanch of the village Baldevbhai had come to the house of the prosecutrix and the appellant was removed from the room at 11-00 a.m. On the next day, the parents of the prosecutrix had arrived at the village and

they were informed about the incident. They decided not to file the complaint before the police because of disracute , but thereafter, at the insistence of her parents the complaint was lodged before Bavlu Police Station for the offence punishable under Sections 452 and 376 of the IPC. The said complaint was registered as C.R.I 34/97. The Investigating Officer, P.S.I. I.K.Chauhan had sent the prosecutrix for medical examination and had collected her clothes which she had put on at the time of incident. The appellant was arrested and he was also sent for medical examination to Government Hospital, Kadi. The incriminating articles were seized under the panchnama and the said articles were sent for analysis to Forensic Science Laboratory (F.S.L.). The Investigating Officer during the investigation had recorded the statement of the complainant. After receipt of the report of the F.S.L. and the evidence collected in connection of the rape on the prosecutrix, charge sheet came to be filed against the appellant in the Court of learned J.M.F.C. for the offence under Sections 452 and 376 of the Indian Penal Code. As the offence under Section 376 of the IPC is exclusively triable by the Court of Sessions, the learned J.M.F.C. committed the case to the Court of Sessions at Mehsana which came to be numbered as Sessions Case No.23/98.

3. The charge Exh.6 was examined against the appellant for the offence punishable under Sections 452 and 376 of the IPC. The charge was read over and explained to the appellant wherein he pleaded not guilty and claimed to be tried.

4. The prosecution in order to bring home the guilt of the appellant examined the following witnesses.

1. Dr. Prakashbhai Pravinbhai Patva, PW1 at Exh.10
2. Trikambhai Joitaram Raval, PW 2, Exh.12.
3. Champaben Becharbhai Vaghri, PW 3, Exh.15
4. Babuji Chaheraji Thakor, PW 4, Exh.17
5. Lilaben Jenaji Thakor, PW 5, Exh.18.
6. Dr.Kalabhai Madhabhai Bajaniya, PW 6, Exh.19.
7. Dantani Becharbhai Keshabhai, PW 8, Exh.25.
8. Thakor Baldevji Chanduji, PW 8, Exh.26.
9. Sonaji Nagarji, PW 9, Exh.27.
10. Ganpat Ramchandra, PW 10, Exh.28
11. Savitaben Becharbhai, PW 11, Exh.29.
12. Shobhnaben Becharbhai, PW 12, Exh.31.
13. Dhanaji Manaji, PW 13, Exh.32
14. Ambaram Ranchhod Vaghri, PW 14, Exh.33.
15. Kachrabhai Sampatbhai, PW 15, Exh. 34
16. Dr. Tarlika Rajeshkumar Mehta, PW 16, Exh.36

17. Laxmanbhai Khimjibhai Chauhan, PW 17, Exh.38
18. Baldevji Meruji, PW 18, Exh.57 &
19. Bhikhaji Motiji, PW 19, Exh.57.

The prosecution to prove the case has produced the following documentary evidence.

1. Report of P.S.O., Bavlu at Exh.50.
2. Complaint at Exh.39.
3. M.L.C. No.2242/97 at Exh.24
4. M.L.C. 450/97 at Exh.20
5. M.L.C. No.456/97 at Exh.37
6. Panchnama of the place of the offence at Exh.41.
7. Panchnama of the body of the complainant at Exh.40
8. Panchnama of the clothes of the complainant at Exh.42.
9. Panchnama of the cycle of the accused at Exh.43.
10. Panchnama of the body of the accused at Exh. 44.
11. Yadi sent to Medical Officer, Kadi at Exh.45.
12. Yadi to the Principal, Primary School, Zalori at Exh.46
13. Yadi to Medical Officer, Kadi at Exh.49
14. Forwarding letter to F.S.L. and report Exh.48 and 47.
15. Birth date certificate of the prosecutrix at Exh.51
16. Bill of Om Cycle & Auto Parts, Kadi at Exh.54.

5. After the prosecution case was over, the appellant was questioned generally and he was questioned against the evidence produced by the prosecution and his statement came to be recorded under Section 313 of the Code. The appellant in his further statement stated that he was serving with the father of the prosecutrix in arranging roof tiles and, therefore, he was known to the family of the prosecutrix. He stated that when the parents of the prosecutrix left for Gandhinagar, they had instructed the appellant to stay at the house with the prosecutrix and other children because they were alone. He deposed that witness Ambaram had locked the house and had raised shouts and a false complaint was lodged against him.

6. The learned Addl. Sessions Judge on appreciation of oral as documentary evidence and the arguments advanced by the learned advocates of the parties held that the prosecution has proved beyond reasonable doubt that at the time of incident, the age of the prosecutrix was below 16 years and that the appellant had committed offence under Sections 452 and 376 of the IPC. On the basis of the above conclusions, the appellant was convicted under Section 452 and 376 of the IPC and sentenced to undergo RI for 7 years and fine of

Rs.5,000/- and in default RI for 6 months.

7. Learned counsel for the appellant and learned A.P.P. Mr. S.J.Dave have taken me through the entire record and proceedings of the Sessions Court. It is submitted by learned advocate for the appellant that the prosecution has not led cogent and convincing evidence about the age of the prosecutrix. It is submitted by learned advocate for the appellant that as per the medical opinion of Dentist, the age of the prosecutrix was more than 16 years and the opinion of the Dentist would more reliable than the report of Radiologist. It is submitted by learned advocate for the appellant that if the prosecutrix was more than 16 years of age, the offence of rape was not proved by the prosecution beyond reasonable doubt. It is submitted by learned advocate for the appellant that the prosecutrix was habituated to sexual intercourse as per the evidence of medical expert and, therefore, this was a case of sexual intercourse by consent and, therefore, the learned Sessions Judge had erred in convicting the appellant for the offence under Section 376 of the IPC. Learned advocate for the appellant has further submitted that the story of the prosecutrix was highly improbable because as per her own deposition, she was sleeping on the cot along with her sisters and it could not be possible to commit rape on her beyond the knowledge of her sisters and brothers who were very much sleeping in the room. Learned advocate for the appellant submitted that the appellant was permitted to stay in the house as the parents of the prosecutrix had gone to Gandhinagar to look after the children, who were alone in the house. Counsel therefore, submitted that the prosecutrix had committed sexual intercourse with the appellant with her consent and admittedly she was more than 17 years of age. Therefore, provisions of Section 376 of IPC would not be attracted. Learned advocate for the appellant has also submitted that if the oral evidence of the witnesses examined by the prosecution is minutely scanned, then there are many inconsistencies, improbabilities and contradictions in their evidence and, therefore, the learned Sessions Judge erred in placing reliance on the inconsistent evidence led by the prosecution.

8. On the other hand, learned A.P.P. Mr. S.J.Dave has vehemently submitted that the prosecution has proved by leading cogent and reliable evidence in the nature of medical opinion as well as school leaving certificate the age of the prosecutrix which was below 16 years on the date of the incident. Learned A.P.P. has submitted that the parents of the prosecutrix had entrusted the custody

of the children to the appellant when they had left for Gandhinagar to inquire about the health of the paternal uncle of the prosecutrix ; that the appellant had taken undue advantage of the situation and had committed heinous crime of committing rape on the prosecutrix who was put in helpless condition. It is submitted by learned A.P.P. that absence of injuries on the body of the prosecutrix will not rule out that the appellant had committed rape on the prosecutrix. It is also submitted by learned Addl. Public Prosecutor that absence of injuries on the body of the prosecutrix would not amount to consent on part of the prosecutrix. Learned A.P.P. has submitted that occification test is not conclusive evidence so far as the Indian Society is concerned. It is submitted that radiological report is more trustworthy than other medical opinion. Learned A.P.P. has further submitted that conviction of rape can be solely based on the evidence of the prosecutrix and in this case, the prosecutrix had in clear terms deposed that the appellant committed rape on her against her consent and had gaged her mouth while committing rape and had overpowered her. Learned A.P.P. has submitted that the conviction and sentence imposed by the learned Addl. Sessions Judge are based on sound principles and learned Sessions Judge has given cogent and convincing reasons for holding the appellant guilty of the offence and, therefore, the appeal deserves to be dismissed and the conviction and sentence be confirmed.

9. In my opinion, the submission of the learned counsel for the appellant that the age of the prosecutrix was 16 years or more than 16 years cannot be accepted. The prosecution has led ample evidence indicating that at the time of the offence, the age of the prosecutrix was below 16 years. The occification test carried out by PW 1 had proved beyond doubt that at the time of the incident the age of the prosecutrix was below 16 years. The oral testimony of the prosecutrix Champaben, which is fully corroborated by evidence of PW 7, Becharbhai, who is the father of the prosecutrix, and evidence of PW 11-Savitaben-mother of the prosecutrix, fully support the case of the prosecution that at the time of incident, she was below 15 years. The submission of the learned counsel that the opinion of the Dental Surgeon with regard to the age of the prosecutrix will carry more weight also does not deserve any merit. The oral as well as documentary evidence, in my opinion, has sufficiently proved that the age of the prosecution at the time of incident was less than 16 years. The opinion of the Dental Surgeon was merely an opinion evidence and the report of occification test and other oral and

documentary evidence are more reliable with regard to the age of the prosecutrix. Therefore, I am of the firm opinion that when the offence in question was committed by the appellant, the age of the prosecutrix was less than 16 years.

10. Learned counsel for the appellant has strenuously urged that in absence of any marks of violence or any medical evidence, it would be hazardous to hold that the appellant had committed rape on the prosecutrix. Learned counsel for the appellant has relied on the medical certificate issued of the prosecutrix at Exh.20. It is true that in the said certificate no mark of violence or external injury was found on the body of the prosecutrix and the certificate indicated that two fingers can be easily inserted in the vagina of the prosecutrix. In my opinion, merely because no marks of violence or no injury was found on the private part of the prosecutrix, it cannot be said that no rape was committed by the appellant. In a case of rape, the evidence of the prosecutrix carries more weight and it would be too much for the Court to insist that the oral testimony of the prosecutrix should be corroborated by the medical evidence. Merely because the prosecutrix was habituated to sexual intercourse, it cannot be said that no offence was committed by the appellant under Section 376 of the IPC. In my opinion, the testimony of the prosecutrix supported by the oral testimony of her sister PW 12-Shobhnaben who was the child witness fully supports the prosecution case that the appellant had committed rape on the prosecutrix in the night of June 21, 1997. The said child witness was sleeping on the same cot on which the prosecutrix was sleeping and her evidence cannot be thrown on the ground that her testimony was not trustworthy. The appellant who was known to the family members of the prosecutrix had taken undue advantage of the absence of the parents of the prosecutrix and had committed heinous crime. In my opinion, the oral testimony of the witnesses examined by the prosecution had proved beyond reasonable doubt that the appellant had committed rape on the prosecutrix and had outraged her modesty. Therefore, the conviction of the appellant recorded by the learned Addl. Sessions Judge for the offence under Sections 376 and 452 of the IPC deserves to be confirmed.

11. Learned advocate for the appellant has submitted that at the time of the commission of the offence, the appellant was aged 21 years. It is submitted that the appellant was teen ager or in his early twenties and might have come nearer to the prosecutrix on account of

natural physical attraction towards each other. It is submitted that the prosecutrix and the appellant were known to each-other since last many years and, therefore, it is possible that they might have developed love or affection for each-other. It is therefore, submitted that though the prosecutrix being less than 16 years on the date of the incident, her consent cannot be a defence for the offence under Section 376 and 452 of IPC, but the above factor can certainly be taken into consideration while imposing the sentence. In my view, the submission of the learned counsel for the appellant deserves some consideration. The manner in which the incident of rape had taken place and the intimacy developed by the appellant and the prosecutrix leads to the situation that the appellant had become prey to temptation of indulging in unlawful sexual activity and if there was no element of force in such unlawful activity, then the case would fall in the category that the appellant and the prosecutrix being in the same age groups i.e. teen-agers might have come nearer on account of natural physical attraction towards each-other and in such a situation, the appellant does not require to be treated in the case of sexual offence. While imposing sentence in such type of cases, if lenient view is taken, it would rather meet the ends of justice, inasmuch as the appellant who had committed the offence in his youthful exuberance may have a sense of self-restraint in future. The present case cannot be put on par with others where the accused may be called sex-maniacs who are out to satisfy their lust or sexual hunger any how. (See 1983 (1) G.L.R. Vol.24 page 268 Himat Popatlal Raval v. State of Gujarat). The above view was followed by the Division Bench of this Court in the case of Budhiyo Chhaganbhai Vaghri v. State of Gujarat, reported in 1991 (2) G.L.R. 32 (2), page 1243. In the above decision the Division Bench having regard to the social set up and relevant circumstances of the case of that case, had reduced the sentence of R.I. for 7 years imposed on the appellant for the offence under Section 376 IPC to R.I. for 2 years. In my opinion, the appellant cannot be put in the category of the offender who can be called sex-maniacs who are out to satisfy their lust or sexual hunger any how. Taking into consideration the totality of the circumstances and the manner in which the offence had taken place coupled with the fact that this being the first offence of the appellant and the fact that both the appellant and prosecutrix were known to each-other, having practically of the same age group and the appellant not being a habitual offender, a lenient view with regard to imposition of sentence requires to be taken.

12. The offence had taken place on the night of June 21, 1997 and thereafter the appellant had remained in custody till today. Therefore, the appellant has already undergone sentence of nearly four years and six months. In my view, there exists special reasons for not imposing the minimum punishment prescribed for the offence under Section 376 of IPC. Hence, the sentence imposed on the appellant of 7 years R.I. deserves to be reduced to the sentence already undergone by the appellant. While reducing the quantum of sentence, in my view, the ends of justice would be met. Therefore, the conviction of the appellant recorded by the learned Addl. Sessions Judge for the offence under Section 376 and 452 is hereby confirmed. However, in view of the peculiar facts and circumstances in which the offence had taken place, the sentence imposed on the appellant of 7 years R.I. is reduced to the period of sentence already undergone by the appellant. The order of fine is maintained. If the fine is not paid, the appellant shall undergo R.I. for six months.

13. In the result, the appeal is partly allowed. The conviction of the appellant for the offences punishable under Sections 376 and 452 of the Indian Penal Code is upheld. However, the sentence of 7 years R.I. imposed on the appellant for the offence under Section 376 of the Indian Penal Code is modified and reduced to sentence which he had already undergone. The order of imposition of fine of Rs.5,000/-, in default, R.I. for six months is hereby confirmed. If the appellant pays fine of Rs.5,000/- in the Sessions Court, the amount of Rs.3,000/- shall be paid to the prosecutrix under Section 357 of the Code of Criminal Procedure, 1973, as directed by the learned Addl. Sessions Judge. On payment of fine of Rs.5,000/- the appellant be set at liberty forthwith, if he is not required to be detained in any other case. If the appellant-accused does not pay the fine of Rs.5,000/-, in default, he shall undergo R.I. for six months. No separate sentence is imposed for the offence under Section 452 of the Indian Penal Code. Order accordingly.

(M.H.Kadri, J.)

*mithabhai